# No. 14646

# United States Court of Appeals

## For The Ninth Circuit

JOE MIKE AYERS,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

## APPELLANT'S OPENING BRIEF

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JOE MIKE AYERS,

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## APPELLANT'S OPENING BRIEF

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### I. JURISDICTIONAL BASIS OF APPEAL

Appellant was indicted for refusal to be inducted into the armed forces of the United States. The indictment appears at pages 3-4 of the Transcript of Record herein. The facts alleged in the indictment are sufficient to charge Appellant with an offence against the United States, as such offence is defined by Section 12 of the Universal Military Training and Service Act, 50 U.S.C.A. Appendix, Sec. 462. The District Court had jurisdiction of such offence by virtue of the provisions of Section 3231, Title 18, U.S.C.A. The District Court, following trial by the court, found Appellant guilty as charged in the indictment, adjudged him convicted of a violation of 50 U.S.C.A. Appendix, Sec. 462, and sentenced him to be committed to the custody of the Attorney General for a period of imprisonment. This judgment and sentence of that court

appears in the Transcript of Record at pages 13-14. Jurisdiction of this court over an appeal from the foregoing judgment and sentence of the District Court is provided by Section 1291 of Title 28, U.S.C.A. Pursuant to Rule 37(a) of the Federal Rules of Criminal Procedure, Appellant took an appeal by filing with the clerk of the District Court a Notice of Appeal in duplicate. The Notice of Appeal is set out at pages 15-16 of the Transcript of Record.

## II. STATEMENT OF THE CASE

Appellant Joe Mike Ayers was found guilty of a violation of the Universal Military Training and Service Act, 50 U.S.C.A. Appendix, Sec. 451 et seq., in that he knowingly refused to submit to induction. Trial was by the court, in the United States District Court for the Southern District of California.

There is no dispute as to the facts of this case. The facts are found in Ayers' Selective Service file. A copy of this file, in the original form in which it was introduced into evidence at trial as Government's Exhibit 1, is a part of the record on appeal herein.[1]

Ayers registered for Selective Service with Local Board No. 140 in San Diego, California, on August 30, 1948. Initially, the local board classified him 1-A, on July 11, 1950. He then notified the local board that he was a student preparing for the ministry; and, on October 27, 1950 the local board reclassified him 1V-D.

The 1V-D classification was continued until early in 1953. On February 18, 1953 Ayers wrote to the local board stating that he was a "conscientious objector" and request-

[1]This exhibit was the only evidence introduced at trial by the Government. See Minutes of the Court, Nov. 23, 1954, at page 9 of the Transcript of Record and Stipulation at pages 21-22 of the Transcript of Record.

ing that he be furnished the Selective Service form required of registrants who claim to be conscientiously opposed to participation in war. On the same day the local board wrote to Ayers requesting information as to his current scholastic activities. Thereafter, Ayers answered by letter the questions of the local board pertaining to his studies and completed and filed with the local board SSS Form No. 150, wherein he stated the nature and basis of his conscientious objection to participation in war. On March 4, 1953 the local board reclassified him 1-A.

On March 19, 1953, Ayers personally appeared before the local board and explained his reasons for claiming to be a conscientious objector, and the local board then reclassified him 1-O. On April 24, 1953 the local board received a letter from R. R. Sanders, Captain, USAF, Coordinator of District 6 of Selective Service System, informing the local board that Ayers was not entitled to a 1-O classification..[2] Without notice or further hearing, the local board reclassified Ayers 1-A on May 7, 1953.

It is contended that this reclassification of Ayers from 1-O to 1-A was invalid. Invalidity is urged upon the grounds that such reclassification was: (1) based upon an erroneous interpretation of the statute and regulations; (2) made contrary to Selective Service regulations; (3) effected in a manner which denied Ayers due process of law; and (4) an arbitrary and capricious act lacking any supporting evidence. It is further contended that the effect of this reclassification was to deny Ayers substantial rights, which denial was not cured by the subsequent appeal to a Selective Service appeal board.

After Ayers received notice from the local board that he had been reclassified from 1-O to 1-A, he requested

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[2]This letter is hereinafter set out in full as "Appendix A."

another personal appearance before the board. This was granted, and on May 21, 1953 Ayers again personally appeared before the board to discuss his conscientious objection to participation in war. However, the board continued him in a 1-A classification.

It is contended that the local board, when it classified Ayers 1-A after his second personal appearance before it, failed to comply with Selective Service regulations by not adequately considering whether he should be classified 1-A-O. This furnishes an additional ground for asserting the invalidity of Ayers' 1-A classification and the induction order based thereon.

Ayers took an appeal from the 1-A classification made by his local board on May 21, 1953. His Selective Service file was forwarded to the appeal board, which in turn referred the file to the Department of Justice for an advisory recommendation. Thereafter, Ayers was given a hearing before a hearing officer and an investigation was made. Both the hearing officer and the Department of Justice recommended that Ayers claim to exemption from both combatant and non-combatant military service be not sustained. On April 15, 1954 the appeal board classified Ayers 1-A. It is contended that this classification was without basis in fact.

Subsequently Ayers was ordered to report for induction and obeyed the order to report. However, he refused to take the oath and to be inducted. Thereafter he was indicted.

A jury was waived and the matter was tried by the court, the Honorable James M. Carter presiding. The Government introduced into evidence as Government's Exhibit 1 a copy of Ayers' Selective Service file and an accompanying

stipulation.[3] The Government then rested its case. This appears in the minutes of the court for November 23, 1954, which appear at pages 9-10 of the Transcript of Record. Ayers moved for a judgment of acquittal at the close of the Government's case and renewed this motion at the end of his own case. This also appears from the minutes of the court appearing at pages 9-10 of the Transcript of Record. The Motion for Judgment of Acquittal appears at pages 10-11 of the Transcript of Record. The court denied Ayers' motion and found him guilty as charged.

On December 13, 1954 Ayers again moved for judgment of acquittal or in the alternative for a new trial. This motion was denied. This appears in the minutes of the court for that day, which are set out at pages 12-13 of the Transcript of Record. A judgment of conviction and a sentence of imprisonment were imposed by the court on December 13, 1954. This judgment and sentence is set out in the Transcript of Record at pages 13-14.

Ayers filed his notice of appeal on December 20, 1954. The notice is contained in the Transcript of Record at pages 15-16. Ayers is presently admitted to bail pending appeal, as appears from the order of the court at page 16 of the Transcript of Record. On January 21, 1954 the court extended Ayers' time within which to file the record on appeal until February 8, 1955. This order appears at pages 17-18 of the Transcript of Record. The certificate of the Clerk of the District Court appears at pages 18-19 of the Transcript of Record, where it appears that the record of appeal was filed in this court on February 8, 1955.

On March 5, 1955 there was filed in this court a stipulation to the effect that the only evidence introduced by the

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[3]As noted in footnote No. 1, the Exhibit is a part of the record herein. The stipulation appears at pages 6-8 of the Transcript of Record.

Government at trial was Government's Exhibit 1. This stipulation was filed for the purpose of clarifying the record and it is set out at pages 21-22 of the Transcript of Record.

## III. SPECIFICATION OF ERRORS

Appellant specifies as the errors upon which he relies the following:

1. The District Court erred in denying Appellant's Motion for Judgment of Acquittal made at the time of trial, on November 23, 1954.

2. The District Court erred in finding Appellant guilty as charged in the indictment. The evidence is insufficient to support a finding of guilt.

## IV. ARGUMENT

### A. Summary of Argument

Ayers is not guilty of a crime. The trial court was in error twice. It erred when it denied Ayers' Motion for Judgment of Acquittal. It erred when it found him guilty as charged in the indictment.

The order to Ayers to report for induction was void because it was based upon an invalid classification of 1-A. That classification is invalid for two reasons.

Ayers was denied a fair chance for his proper classification on his personal appearance before his local board. This contention is urged upon the following grounds:

(1) The local board applied an erroneous interpretation of law in considering Ayers' classification;

(2) The local board violated Selective Service regulations by reopening Ayers' classification and changing it from 1-O to 1-A;

(3) The local board denied Ayers due process of law by denying him access to the information which was used as the basis for his reclassification and by allowing a member of the military to substitute his judgment for that of the local board.

(4) The local board failed to properly consider the question of whether Ayers should be classified 1-A-O.

The 1-A classification given Ayers was also invalid because it was without basis in fact. The record shows that the local board did not doubt the genuineness and sincerity of Ayers' claim to be a conscientious objector, but that it decided that even though he was sincere he must be classified 1-A. The record contains no affirmative evidence which would support the denial of the claimed classification of 1-O. Therefore, the 1-A classification made was without basis in fact.

**B. Ayers' order to report for induction was void because the local board, in effect, denied him a hearing upon his claim to be classified as a conscientious objector.**

The local board failed to give Ayers a fair hearing. His last personal appearance before the local board, on May 21, 1953, was the same as no hearing at all.

This court has pointed out in *White v. United States,* 9 Cir., 215 F.2d 782, and reiterated in *Franks v. United States,* 9 Cir., 216 F.2d 266, and *Shepherd v. United States,* 9 Cir., 217 F.2d 942, the vital importance of the personal appearance before the local board in the procedure for classifying a Selective Service registrant who claims to be conscientiously opposed to participation in war. A registrant who fails to have a fair chance for his proper classification on his appearance before the local board has been denied something which cannot be cured through the ac-

tion of the appeal board. *Knox v. United States,* 9 Cir., 200 F.2d 398, *Franks v. United States,* supra.

To fully comprehend the scope and effect of the hearing given Ayers by the local board it is necessary to examine local board action during the period from March 19, 1953 to and including May 21, 1953. Ayers had two personal appearances before his local board. The first was on March 19, 1953; the second was on May 21, 1953.

**1. The local board applied an erroneous theory of law in classifying Ayers.**

After the first personal appearance the local board classified Ayers 1-O. At the time of this appearance the local board had the opportunity to judge of the genuineness, the sincerity and the extent of Ayers' conscientious objection to military service. The board then accepted the genuineness and sincerity of his conscientious objections to participation in both combatant and non-combatant military training.

Then the letter from Captain Sanders, USAF, entered the picture.[4] The local board received this letter on April 24, 1953, and on May 7, 1953 it reopened Ayers' classification and classified him 1-A. The record is devoid of any evidence, other than this letter from Captain Sanders, upon which the board could have acted. Further, the written summary of Ayers' second personal appearance before the board affirmatively shows that the board was influenced by that letter.[5]

Captain Sanders, in a peremptory tone, informed the local board that Ayers' 1-O classification was unwarranted

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[4]See Appendix A.

[5]The written summary of that personal appearance is hereinafter set out in full as "Appendix B."

under the regulations because another Selective Service registrant who belonged to the same religious organization as Ayers was to be classified 1-A by another local board at some future time. Captain Sanders' interpretation of the regulations was erroneous.

The purported statements of fact contained in the letter from Captain Sanders do not concern Ayers as an individual; they refer to the religious organization to which he belongs. Neither the statute nor the regulations requires a conscientious objector to belong to a religious sect or organization meeting specified standards. *United States v. Alvies,* D.C. N.D. Calif., 112 F.Supp. 618, and cases there cited.

The statutory language creating the exemption from military training for conscientious objectors phrases the test for exemption in terms of the individual's belief not his membership in a sect or organization. Section 6 (j) ,Title I of the *Universal Military Training and Service Act,* 50 U.S.C.A. Appendix, 456 (j), in so far as it is here material, provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code . . . "

*Selective Service Regulations,* Title 32, Sec. 1622.1 (d) provide:

> "In classifying a registrant there shall be no discrimination for or against him because of his race,

> creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each such registrant shall receive equal justice."

It is apparent from the summary of Ayers' second personal appearance that the board accepted and adopted Captain Sanders' erroneous interpretation. It is there stated, "Board Members explained his views were contrary to our beliefs, and *according to the Selective Service Regulations he could not be considered in any other classification but 1-A.* Therefore, the board could not change his classification." (Emphasis Supplied)

It is submitted that these facts put the Ayers case in the same class with *United States v. Hagaman,* 3 Cir., 213 F.2d 86; *Hinkle v. United States,* 9 Cir., 216 F.2d 8; and *Shepherd v. United States,* supra, where the courts concluded that board action was based upon an erroneous view of the law and not upon any disbelief on the honesty and sincerity of the registrant. In *Shepherd v. United States,* supra, it was held that a hearing before a Department proceeding upon an erroneous theory of law is no better than no hearing at all. In that case, this court, in commenting upon the probability that an appeal board had followed a Department of Justice recommendation based upon an erroneous interpretation of law, said at page 945:

> " . . . On the other hand, we cannot close our eyes to the strong probability that the appeal board, no doubt composed of laymen, would be much influenced by such a statement of the Department of Justice recommending that even if the registrant was sincere he could not be exempted because of his expressed beliefs relating to self defense and theocratic wars."

The present case, it is submitted, is on all fours with the Shepherd case with respect to the probability that the hearing proceeded upon an erroneous interpretation of the law. Captain Sanders was an official in the Selective Service System, the Coordinator of District 6. Considering the letter alone, it seems highly probable that the local board, "no doubt composed of laymen," would be much influenced by an opinion from a high-level Selective Service official. But the minutes of the local board remove any doubt as to the influence. They demonstrate that Captain Sanders' interpretation of the regulations became the interpretation of the local board.

When the local board considered only Ayers' demeanor and sincerity at the time of his first personal appearance, it classified him 1-O. But, at the second personal appearance, when there had been added to the considerations influencing the board the erroneous interpretation of the regulations, he was classified 1-A. Thus, the local board in effect deprived Ayers of a fair hearing upon his claim to classification as a conscientious objector.

**2. The local board acted contrary to regulations by reopening and reconsidering Ayers' classification.**

The local board acted in excess of its jurisdiction when it reopened Ayers' classification on May 7, 1953. This reopening and reconsideration of Ayers' classification was void because it was a violation of *Selective Service Regulations*, Title 32, Sec. 1625.2, which, in so far is here material, provides:

> "The local board may reopen and consider anew the classification of a registrant . . . (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; . . . "

As pointed out above, the record is devoid of any evidence except the Sanders' letter upon which the local board could have acted in reopening Ayers' classification. That letter contains no facts which, if true, would justify a change in his classification. Even, assuming the truth of the facts concerning the religious organization to which Ayers belonged, there was no basis for changing his classification. The test for conscientious objector classification is the individual's personal views and belief, not his membership in a given sect or organization, for the reasons stated earlier in this discussion.

This reopening of Ayers' classification, contrary to the regulations, rendered the new classification of 1-A void. This rule was stated in *United States v. Fry,* 2 Cir. 203 F.2d 638, where it was said:

> "Selective Service regulations contain substantial rights and failure to act in conformity thereto on part of local board is denial of due process which renders 1-A classification a nullity."

This rule was reaffirmed by the Court of Appeals for the Second Circuit in *United States v. Vincelli,* 2 Cir., 215 F.2d 210, and was followed by this court in *Knox v. United States,* supra, and *Franks v. United States,* supra.

### 3. The local board denied Ayers access to the information which was the basis of his reclassification.

The record shows that Ayers was not given access to the information in Captain Sanders' letter. The local board, after receiving that letter, reopened Ayers' classification and reclassified him 1-A without prior notice or hearing. The summary of the second personal appearance contains no reference to the facts contained in that letter.

Ayers had no opportunity to set forth facts concerning his religious organization or its effect upon his religious training and belief and conscientious objections to participation in war. It is immaterial that the "new information" was not a valid basis for reopening his classification. If it was in fact the basis for reopening he should have had the opportunity to explain it and to offer evidence to overcome its effect. Failure to give him such an opportunity was a denial of due process. *Sheats v. United States,* 10 Cir., 215 F.2d 746; *Breuer v. United States,* 4 Cir., 211 F.2d 864; U. S. ex rel *Levy v. Cain,* 2 Cir., 149 F.2d 338.

**4. The local board acted arbitrarily and capriciously and without basis in fact in reclassifying Ayers.**

The 1-A classification given Ayers by the local board was void for still another reason. The reclassification from 1-O to 1-A was arbitrary and capricious action, without basis in fact.

The facts concerning this action by the local board are almost identical with those in the case of *Ex parte Asit Ranjan Ghosh,* D.C. S.D. Calif., 58 F.Supp. 851, appeal dismissed 148 F.2d 822. In that case the petitioner had been classified 4-C, a citizen of a foreign country, by his local board. As was the practice, his local board, at his request, issued to him a certificate of non-residence. This certificate was subsequently renewed twice. Thereafter, the State Director of Selective Service wrote to the local board that, "Consequently, it would seem that he is no longer entitled to exemption in accordance with the policy laid down by national headquarters for causes of this kind. . . ." (Footnote No. 1 at page 852 of the opinion.) Following receipt of this letter, and with no other evidence before it, the local board summarily canceled the certificate of non-residence and classified Ghosh 1-A.

In the Ghosh case the court granted a writ of habeas corpus, saying, at page 857:

> "The only additional thing before the board on March 10th, was a letter from the State Director of March 1, 1944, the effect of which was to peremptorily suggest to the board that they recall and cancel petitioner's certificate of non-residence. . . . And the State Director is not empowered under the Act to promulgate rules or regulations nor to substitute his judgment for that of the local or appeal boards. . . . My view is that it points up to no other conclusion than that the local board acted on March 10th without any supporting evidence and, I might say, in an arbitrary and capricious manner."

The court further pointed out in the Ghosh opinion that Congress intended to keep selective service classification of individuals out of the hands of the military. Then, as now, members of the armed forces were prohibited from serving on selective service boards.

Under the law, Ayers was entitled to have his claim for exemption heard by a board of civilians, his neighbors.[6] But, he was in fact classified by Captain Sanders, a military man. The local board set aside its own, independent determination that Ayers should be classified 1-O and substituted therefor Captain Sanders' determination that he

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[6]In *Knox* v. *United States*, 9 Cir., 200 F.2d 398, the court said, at page 401:

> "Classification by the local board is an indispensable step in the process of induction. The registrant is entitled to have his claim considered and acted upon by these local bodies the membership of which is composed of residents of his own community. An underlying concept of the Selective Service System is that those subject to call for service in the armed forces are to be classified by their neighbors—people who are in a position to know best their backgrounds, their situation and activities."

should be classified 1-A. This is still another reason why Ayers was denied a fair hearing before the local board.

When the local board reclassified Ayers from 1-O to 1-A it failed to properly consider whether he should be classified 1-A-O. Such failure by the local board is a violation of the regulations which renders a subsequent induction order invalid. *Franks v. United States,* supra. The facts of this case, it is submitted, clearly indicate that the rule of the Franks case applies.

In the Franks case this court decided that the record failed to prove that the local board had fully considered a 1-A-O classification where its minutes stated, " . . . Franks did not want consideration as a 1-A-O. Board voted unanimously that Franks should be classified 1-A as in accordance with Selective Service Regulations they could not consider and did not consider him a true Conscientious Objector as described in the Regulations . . . "

Here, the record is equally clear that the local board failed to fully consider a 1-A-O classification. The minutes of the local board covering Ayers personal appearance on May 21, 1953, state, inter alia:

> "The above named registrant appeared before the members of the local board to appeal his 1-A Classification. He claims to be a conscientious objector to war in any form.
>
> "He had appeared before the Board Members on March 19, 1953. He was asked if he felt the same about his religious beliefs. He said he did. Board Members explained his views were contrary to our beliefs, and according to the Selective Service Regulations he could not be considered in any other classification but 1-A. Therefore, the board could not change his classification . . . "

Be it remembered that subsequent to Ayers personal appearance before the board on March 19, 1953 he was asked if he felt the same about his religious beliefs as on that date, and he replied affirmatively. Then the board explained that he could not be classified other than 1-A.

From the record it can logically be inferred that the board not only failed to fully consider a 1-A-O classification, but failed to consider it at all. Until the board received the letter from Captain Sanders it felt that Ayers should be classified 1-O. But after it received that letter, it leap-frogged any consideration of a 1-A-O classification and applied the Sanders' erroneous interpretation and classified Ayers 1-A.

Reduced to its simplest form, the foregoing argument is that the letter from Captain Sanders prevented Ayers from having a fair hearing before his local board. That letter interjected an erroneous theory of law into the classification procedures applied to Ayers. The record is clear that the board accepted and adopted this erroneous interpretation. The local board violated Selective Service Regulations by reopening and reclassifying in the first place, and by failing to fully consider a 1-A-O classification once it had undertaken to reclassify. The board acted arbitrarily and capriciously in reclassifying and gave Ayers no opportunity to meet and defend against the information which was the basis for reclassifying. All this was a denial of due process. The authorities cited above establish that the induction order directed to Ayers was invalid.

Nor did the appeal cure the action of the local board. This court made the rule clear in *Franks v. United States,* supra, where it said, at pages 270-271:

> " . . . Therefore a registrant who fails to have a fair chance for his proper classification on his appearance

before the local board has been denied something which cannot be cured through the action of the appeal board. Such was our holding in Knox v. United States, 9 Cir., 200 F.2d 398."

### C. Ayers' order to report for induction was void because his 1-A classification was without basis in fact.

There is still another reason why the order to Ayers to report for induction was void. That order was based upon an invalid classification of 1-A. There is no basis in fact for such a classification.

This court has announced the standards which should be applied in determining whether or not there was a basis in fact for denying a classification as a conscientious objector in *White v. United States,* supra, and *Pitts v. United States,* 9 Cir., 217 F.2d 590. In the White case it was held that the rule of *Dickinson v. United States,* 346 U.S. 389, 98 L.ed. 132, 74 S.Ct. 152, does not apply in a case where the local board has rejected a claim of conscientious objection after a personal appearance before the board when it can be inferred that the board's conclusions have been based upon the demeanor and apparent credibility of the registrant. But, in the Pitts case it was held that when it cannot be inferred that the local board rejected a claimed classification as a conscientious objector because it doubted the sincerity of the registrant or the genuineness of his claim that the principles of the Dickinson case must be applied.

The Dickinson case requires a reviewing court to search the record for some affirmative evidence to support the denial of the classification claimed by the registrant, and holds that absent such evidence there is no basis in fact for denying the classification claimed if the registrant has made a prima facie case for entitlement thereto.

It is submitted that the Ayers' situation is one requiring the application of the principles of the Dickinson case, under the rule of the Pitts case. Ayers made a prima facie case for his entitlement to a 1-O classification by filing with the board SSS Form 150 and written statements of his religious beliefs with respect to participation in war. Copies of these documents are in Government Exhibit 1, included in the record herein in original form.

Ayers did more than establish a prima facie case, however. By virtue of his first personal appearance before the local board he convinced the board that he should be classified 1-O. It cannot be inferred that the local board reclassified him 1-A because it doubted his sincerity at the second personal appearance. The only reasonable inference is that the local board was acting under the erroneous impression that even though Ayers was sincere in his objections that he must be classified 1-A because Captain Sanders had told the board that the regulations required such a classification.

Applying, then, the rule of the Dickinson case, what affirmative evidence is there in the record to support a denial of a 1-O classification? It is respectfully submitted that the answer to that question is "None."

Certainly Captain Sanders' letter is not evidence which supports a denial of a 1-O classification, for the reasons pointed out in previous discussion. The summary of the second personal appearance contains no reference to anything which could be considered evidence to support a denial.

The only other material matter which entered the file between the time of the first personal appearance, when Ayers was classified 1-O, and the classification by the appeal board was the recommendation of the Department of Jus-

tice. The import of that recommendation is that the claimed classification should be denied because Ayers was not as articulate as the hearing officer felt he should have been.

But even assuming that Ayers failed to say enough to make a prima facie case for entitlement to a 1-O classification at the time of his appearance before the hearing officer, such fact is not affirmative evidence which will support a denial. Ayers made his prima facie case before he reached the hearing officer stage of the proceeding. Viewed as evidence, the most that can be said for the report is that it was a lack of evidence by Ayers. It is negative, not affirmative evidence; and it will not support a denial.

Incorporated by reference into the Department of Justice recommendation was a resume of the investigative report. That report contained summaries of interviews with people who were acquainted with Ayers. Opinions as to his sincerity varied. Though most of the people interviewed believed him to be sincere, some did not. But the statements of such opinions are not a proper evidentiary basis for denying a claimed classification. *Annett v. United States,* 10 Cir., 205 F.2d 689; *United States v. Close,* 7 Cir., 215 F.2d 439. As was said in the Annett case, at page 691, "To merely state that he does not consider him sincere without giving a single fact upon which such belief is predicated does not rise to the dignity of evidence."

This court has ruled in *Franks v. United States,* supra, that in a criminal prosecution of this kind, the burden is upon the Government to establish a valid induction order. And in *Shepherd v. United States,* supra, this court decided that, in a criminal case, the presumption that official action has been regularly performed is insufficient to overcome the likelihood of erroneous action by a Selective Service board when the record discloses such likelihood.

This is a criminal prosecution. The foregoing principles apply. And, as further stated in the Franks case, supra, where the matters complained of having a bearing upon the validity of the induction order, the reviewing court must view the record in the light most favorable to the registrant.

So viewed the record discloses no affirmative evidence to support a denial of a 1-O classification. Without such evidence there is no basis in fact for the classification of 1-A and a conviction of refusal to submit to induction in obedience to an induction order based on such classification must be reversed. *Dickinson v. United States,* supra; *Pitts v. United States,* supra.

### D. Conclusion

The evidence of the invalidity of the induction order was before the trial court as Government Exhibit 1, which is included in this record in its original form. Therefore, it was error for the trial court to deny Ayers' Motion for Judgment of Acquittal and to find him guilty. Accordingly, the judgment of the District Court should be reversed.

Dated, Santa Ana, California,
April 15, 1955.

Respectfully submitted,

ELLIOTT AND MURRAY,
WILLIAM L. MURRAY, ESQUIRE,
*Attorneys for Appellant*

## APPENDIX A.

### SELECTIVE SERVICE SYSTEM

DISTRICT HEADQUARTERS NO. 6
3972 Main Street
RIVERSIDE, CALIFORNIA

(Stamp of Local Board)

23 April 1953

Selective Service System
Local Board No. 140
525 "E" Street
San Diego, California

LOCAL BOARD NO. 140
San Diego County
April 24, 1953
Room 222, 525 E Street
San Diego, California

Subjects: AYERS, Joe Mike, SS No. 4-140-29-496
International Christian Revival Association

Gentlemen:

The subject registrant has been given a classification of 1-O because he claims membership in the subject religious organization, which is located at 1841 W. Palmyra Street, Orange, California.

It so happens that Local Board No. 135, Santa Ana, has recently made an investigation of this organization because one of their registrants is also claiming to be a conscientious objector, and eligible for Class 1-O.

The investigation revealed that this organization has, at present, only some 20 members, and that they are supervised by Mr. George E. Andrus, 5742 E. Thelma Avenue, Buena Park, California. Mr. Andrus was contacted this date, and stated that he was ordained in 1946. He is em-

ployed as a teacher in the Santa Ana Junior College. H advised that subject religious organization was incorpor ated in 1951, and verified a statement made by the Sant Ana registrant that the group decided, on 18 Novembe 1952, that they were conscientiously opposed to war and on that date, passed a resolution to that effect.

In view of the above, it would appear that a classificatio of 1-O is not warranted under the provisions of Sectio 1622.14 of Selective Service Regulations.

For your information, the Santa Ana registrant belong ing to this organization is, at the present time, a full-tim student and is in a student's classification. It is the intentio of Local Board No. 135 to place him in Class 1-A when h no longer qualifies for a student's classification.

Very truly yours,

R. R. SANDERS
R. R. Sanders
Captain, USAF
COORDINATOR, DISTRICT 6

rrs:lrk

## APPENDIX B.

ERSONAL APPEARANCE MAY 21, 1953

YERS, JOE MIKE SS NO. 4-140-29-496

The above named registrant appeared before the members of the local board to appeal his 1-A Classification. He laims to be a conscientious objector to war in any form.

He had appeared before the Board Members on March 9, 1953. He was asked if he felt the same about his religious beliefs. He said he did.

Board Members explained his views were contrary to ur beliefs, and according to the Selective Service Regulations he could not be considered in any other classification ut 1-A. Therefore, the board could not change his assification.

In that event he asked that his file be sent on to the oard of Appeals, for their consideration. Before this is one however, he wished to place in writing his religious eliefs so that all that information could accompany his le to the Board of Appeal.

Registrant also asked that his Board be transferred to ong Beach, Calif. Members explained that this could not e done. However, he could request transfer to that area, f his inductions, personal appearances, etc., in the future he so wished.

Board agreed to wait for further information from the egistrant before forwarding his file to the Board of Appeal.

JOSEPH LEVIKON

. A. HAISCH

lerk, Local Board No. 140

-21-53